IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 18, 2007

STATE OF TENNESSEE v. JOHN W. FOSTER, JR.

Direct Appeal from the Criminal Court for Davidson County
No. 2004-C-1885 Steve R. Dozier, Judge

No. M2006-02724-CCA-R3-CD - Filed February 15, 2008

The defendant, John W. Foster, Jr., was convicted by a Davidson County jury of aggravated robbery, a Class B felony, and sentenced by the trial court to thirty years at 60% as a career offender. In a timely appeal to this court, the defendant challenges the sufficiency of the evidence and the trial court's denial of his motion for a mistrial. Based on our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and D. KELLY THOMAS, JR., JJ., joined.

Michael A. Colavecchio (on appeal) and Ronald E. Munkeboe, Jr. (at trial), Nashville, Tennessee, for the appellant, John W. Foster, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Smith, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On the night of April 17, 2004, the victim, Karla Gordon, was leaving an O'Charley's restaurant with two friends, Carleen Haley and Jennifer Johnson, when she was robbed at gunpoint by a white man in his thirties who fled the scene in a black car. Both Gordon and Haley subsequently identified the defendant as the robber.

State's Case-in-Chief

Jennifer Johnson testified at the defendant's August 15-16, 2005, trial that the robbery occurred at about 11:30 p.m. as she, Haley, and the victim were visiting in the parking lot of the restaurant. She said she was in the driver's seat of her vehicle talking through the open driver's side window to Haley and the victim, who were standing in the empty parking space beside her, when a small, two-door, grayish black car similar to a Honda Civic pulled up behind her. She stated that Haley suddenly screamed and ran in front of her vehicle. When Johnson looked over, she saw a man standing beside her vehicle pointing a silver object at the victim. In response, Johnson rolled up her window and began blowing her horn. She said the man took the victim's purse, ran back to his vehicle, which he had left with engine running and driver's door open, got in, and exited the parking lot. At that point, Johnson jumped out of her vehicle and began running toward the restaurant for help.

Johnson testified that the area was fairly well-lit and she was able to see that the robber was alone in his vehicle. She was also able to provide a general description of his appearance to police but was unable to describe his features because she did not get a good look at his face. She testified that she described the robber as a white male in his middle thirties, approximately five feet, seven inches tall, wearing denim shorts, a tank top, and flip-flops. She said she had at least two beers from the time she arrived at the restaurant at 8:30 p.m until she left at 11:30 p.m, but she did not feel impaired.

Carleen Haley testified that she arrived at the restaurant between 9:30 and 10:00 p.m., had dinner with a group of friends, during which time she drank one to two beers, and then left the restaurant at 11:30 p.m. with the victim and Johnson. She said the three walked to Johnson's car, which was parked in a well-lit area near the restaurant, where they continued their conversation. As the women talked, a car approached and stopped with its front end behind Johnson's vehicle, blocking her exit. Haley said that the driver stuck his head out the window and that she took a step toward him because she thought he was about to ask for directions. She quickly sensed, however, that something was amiss:

> I saw his face and everything, yeah. And, I thought he was like lost or needed directions or something like that. And, I actually took a step towards him. He was actually focused on me. And, [the victim] was like right across from me and it was like we had eye contact.
>
> And, so, I thought, oh, you know. And, he said -- he kind of mumbled something and, so, I . . . said, "Huh?" And, then, when he started to get out of the car, I just instantly had a bad vibe. And, I went away from the vehicle, but, he was still watching me like the whole time. And, I went to the front of [Johnson's] car and I screamed just to draw attention. And, she started honking her horn.

Haley testified that as she backed away, the man shifted his focus to the victim. She said he took two steps toward the victim, grabbed her arm, put something to her side, and said, "Give me your purse or I'll shoot you." She stated that the man took the victim's purse and then turned to look

at her again as if trying to decide whether he was going to take her purse as well. She said she screamed to the driver of a nearby SUV to take down the robber's license plate number. In the meantime, Johnson continued to blow her car horn. Apparently unnerved by the noise, the robber jumped back in his vehicle and took off while Haley called 9-1-1 on her cell phone.

Haley testified that she described the robber to police as a short, very stocky man with close cropped or "buzz cut" hair and a goatee dressed in a tee shirt, shorts, and flip-flops. She said that she was within three feet of the robber, who twice made direct eye contact with her, and that she consequently got a good look at his features. Two to three days after the robbery, she picked the defendant's photograph out of a six-person photographic array she was shown by a police detective, identifying the defendant as the man who had robbed the victim. Haley also made a positive courtroom identification of the defendant as the robber. She said that the defendant's image was ingrained in her memory and that she was positive in her identification. She testified that the defendant's vehicle was a black, smaller model car similar to a Nissan, but she could not recall whether it was a two or a four-door vehicle. She said she never saw any weapon but assumed that the defendant was armed by the way he was holding his hand to the victim's side and his threat to shoot her.

The victim testified that she arrived at the restaurant at about 9:30 p.m., had one drink, a White Russian, during dinner, and left the restaurant with Haley and Johnson at 10:30 or 11:00 p.m. She said that she and Haley walked Johnson to her car, which was parked in a well-lit area, and then remained beside the driver's door to talk to her. Three or four minutes later, a man in a black, four-door vehicle pulled up quickly behind Johnson's car and said something to Haley, who replied "Excuse me," and backed away. The victim testified that the man then got out of his vehicle, leaving the engine running, took two steps toward her, grabbed her right arm, stuck a small silver gun in her side and said, "Give me your purse or I'll shoot you." She said the man began pulling the purse from her and that she initially hung onto it but then "let go and let him take it." At that point, the man turned around, got back into his car, and took off.

The victim testified that she had a clear view of the robber's face and was able to describe him to the police. She said he had short, bleached blonde hair,"very blue eyes," and was wearing a dark shirt, blue jean shorts, and flip-flops. A short time after the robbery, she identified the defendant as the robber by choosing his photograph, marked number four, from a six-person photographic array she was shown by a police detective. The victim testified that she told the detective that number two looked similar, but she was positive that number four was the robber. She said the two men "had basically the same features, but, the eyes of number four, I just knew it was him, positively." The victim also made a positive courtroom identification of the defendant as the robber, testifying that she had no doubt about her identification.

The victim acknowledged that she was very scared during the robbery and that the entire episode lasted only a few minutes. She said she was sure she described the robber as a short, stocky white male with very short blonde hair and blue eyes. She agreed that it would, therefore, have been a mistake on the part of the police officer who recorded her statement if the police report stated that

she had described the robber as having brown, rather than blue, eyes. Finally, she testified that she was not positive about the number of doors on the robber's vehicle.

Retired Metropolitan Police Detective Daniel Whitehurst, who was the lead detective assigned to the case, testified that after developing the defendant as a suspect, he compiled a photographic array containing the defendant's photograph and those of five similar-looking men. He said he showed the array to the victim and Haley on April 19, 2004, at separate times and at separate locations, and that each identified the defendant as the robber. He testified that after he had obtained an aggravated robbery warrant against the defendant, the defendant's father, John Foster, Sr., telephoned him to talk about the outstanding arrest warrant against his son.

Sergeant Stephen Duncan of the Metropolitan Police Department testified that on April 26, 2004, he accompanied several fellow officers to the residence of the defendant's parents in an attempt to serve the aggravated robbery arrest warrant on the defendant. He said that they had unsuccessfully attempted to serve the warrant on the defendant at the residence the previous day. He stated that, on April 26, a black, Nissan Altima was parked in front of the residence and that the defendant was found hiding in a bedroom closet. Sergeant Duncan testified that he thought the Nissan was a four-door model.

Defendant's Proof

Metropolitan Police Officer Heather Baltz, who responded to the robbery call at the O'Charley's restaurant, testified that the victim and her friends described the robber to her "as a male white, five foot five, a hundred seventy pounds, blonde hair and brown eyes." She acknowledged that she had no memory of which woman supplied the information about the robber's eye color and testified that none of the women appeared to be intoxicated or impaired.

Sixty-eight-year-old Edmond Wells testified that on April 17, 2004, the defendant and his father, a close friend and former employer, picked him up at his Dickson home at 7:00 a.m. for a trip to a Tunica, Mississippi, casino, where they remained until about 11:00 or 11:30 p.m. that night. According to Wells, the men dropped him back off at his home at about 3:00 the following morning. Wells was unable, however, to recall the name or appearance of the casino. He said that he was " half lit" by the time they reached Tunica and acknowledged that he was a "pretty heavy drinker." He was also unable to recall where he had been "two weeks ago on a Saturday night." Finally, he testified that he had told the prosecutor's investigator on August 10, 2005, five days prior to trial, that he could not tell him anything because he was drunk on the day that he went to the casino.

John Foster, Sr., testified that he and the defendant left home at about 6:00 a.m. on April 17, 2004, picked up Wells at about 7:00 a.m., and arrived in Tunica at about 11:00 or 11:30 a.m. He said they visited two casinos, the Grand and Sam's Town, before leaving Tunica at about 10:00 or 10:30 p.m. to arrive back home at about 3:30 the next morning. Foster testified that the police twice came to his house looking for the defendant, telling him that they had a warrant for his arrest but not

providing any details. He denied that he ever contacted Detective Whitehurst or attempted to take the defendant to the police station to turn himself in.

State's Rebuttal Proof

Investigator Robert Chaudoin with the District Attorney's Office in Nashville testified that he spoke by telephone with Edmond Wells on the Wednesday prior to trial. He said that when he told Wells that his name had been furnished as an alibi witness by the defense, Wells responded, "I'm not a witness, I was drunk."

Sergeant Duncan testified that the defendant's father denied that the defendant was present at his residence, a small house trailer, on April 26 when the officers arrived to serve the arrest warrant. He conceded, however, that the defendant's father gave the officers his consent to search the residence.

Detective Whitehurst testified that Foster, Sr. called him on the day before the defendant was apprehended, wanting to know why the police were looking for the defendant. He said that when he told him that a warrant was out for the defendant's arrest, Foster, Sr. replied that the defendant "didn't take that woman's purse." When he asked how he knew anything about a purse, Foster, Sr. said that the defendant "didn't have a gun when he did whatever." In the same conversation, Foster, Sr. told him that he had brought the defendant to the police station to turn him in, but the defendant had gotten out of the car and run away. According to Detective Whitehurst, this conversation occurred on the day prior to the defendant's arrest, before Foster, Sr. would have had access to the arrest warrant or any details about the robbery.

ANALYSIS

I. Sufficiency of the Evidence

As his first issue, the defendant challenges the sufficiency of the convicting evidence. Specifically, he contends that the evidence was insufficient to establish his identity as the robber. In support, he cites, *inter alia*, the discrepancies in the witnesses' descriptions of the getaway vehicle; the police report indicating that the defendant was described at the scene as having brown, rather than blue, eyes; the fact that all three eyewitnesses admitted to having consumed alcohol during their dinner; and the testimony of the defendant's alibi witnesses which, according to the defendant, "exonerated [him] of the crimes."

In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the

findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In support of his contention that the evidence was insufficient to establish his identity, the defendant primarily focuses on the discrepancies in the eyewitnesses' descriptions of the robber's vehicle. He argues that "it is hard to believe that these women could not recall such a simple" detail as whether the vehicle was a coupe or a sedan and that their differing identifications of the make of the vehicle as either a Honda or a Nissan "show that their testimonies were seen through the lenses of fright and anxiety, which clouded their memory and allowed them to conveniently tack on details to tighten the shackles on the [defendant.]" The State argues, *inter alia*, that it was within the jury's province to weigh the credibility of the witnesses and that the minor inconsistencies in the women's descriptions of the vehicle were not material, given the fact that both the victim and Haley positively identified the defendant as the perpetrator. We agree with the State.

Although the women differed in their testimony as to the number of doors or possible make of the vehicle, they were consistent in describing it as a dark, smaller model car. Moreover, neither Johnson nor Haley indicated that they were certain in their identification of the make of the vehicle. Johnson testified only that it was a small, dark car "like a Honda," while Haley, who said she was "not the car person of the year," testified that she believed it was "like a Nissan." Unlike the defendant, we do not find it hard to believe that the women would be unable to recall with certainty whether the vehicle had two or four doors, as their attention was no doubt primarily focused on the robber. In this respect, we note that all three women consistently described the assailant as a short white man with very short "buzz cut" hair, wearing shorts, a tee shirt, and flip-flops. More importantly, both Haley and the victim picked the defendant's photograph out of a six-person photographic array two days after the robbery and both positively and unequivocally identified him

in court as the perpetrator of the crime. The credibility of eyewitness testimony identifying the defendant as the perpetrator of a crime is a question of fact for the jury to determine upon consideration of all competent proof. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993).

The defendant argues that the eyewitness testimony is unreliable given the alcohol the women drank during dinner. According to the proof at trial, however, the women consumed only one to two drinks each during the course of their entire dinner. Johnson, who said she had two beers, testified that she did not feel impaired, and Officer Baltz, who took the initial report of the crime, testified that none of the women appeared intoxicated. By contrast, one of the defendant's alibi witnesses admitted that he was an habitual heavy drinker and had been "half lit" by the time he reached Tunica. The defendant also argues that the initial police report conflicts with the victim's trial testimony that she was certain in her identification of the defendant by the appearance of his eyes, which she described as "very blue." The victim testified at trial, however, that she was certain she described her assailant's eyes as blue, and Officer Baltz acknowledged that she did not know which of the three women supplied the information about the assailant's brown eye color.

In addition to the eyewitnesses' unequivocal identification of the defendant as the perpetrator, the defendant's father blurted out unreleased details of the crime to the detective investigating the case, and a car matching the description of the robber's vehicle was found at the father's home at the same time that the defendant was discovered hiding in a closet of the residence. From this evidence, a rational jury could have found that the defendant was the perpetrator of the crime beyond a reasonable doubt. We conclude, therefore, that the evidence, viewed in the light most favorable to the State, was sufficient to sustain the defendant's conviction for aggravated robbery.

II. Denial of Motion for Mistrial

The defendant next contends that the trial court erred by denying his motion for a mistrial following Haley's reference, in violation of a pretrial order, to the tag number of the defendant's vehicle. During cross-examination, Haley volunteered that the people in the SUV had given her the license plate number of the robber's vehicle, which she had conveyed to the 9-1-1 dispatcher. Defense counsel then moved for a mistrial, which the trial court denied. The trial court did, however, issue a curative instruction to the jurors that there was "no tag number obtained" and they were to disregard Haley's testimony about the license tag number.

Whether to declare a mistrial lies within the sound discretion of the trial court, and its decision in this regard will not be overturned on appeal absent a showing of an abuse of discretion. State v. Land, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000). A mistrial should be declared in a criminal case only when something has occurred that would prevent an impartial verdict, thereby resulting in a miscarriage of justice if a mistrial is not declared. See id. (citing State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994)); State v. Jones, 15 S.W.3d 880, 893 (Tenn. Crim. App. 1999) (citing Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977)). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such

action by the trial judge." State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (quoting Arnold, 563 S.W.2d at 794. The burden to show the necessity for a mistrial falls upon the party seeking the mistrial. Land, 34 S.W.3d at 527 (citing State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)).

No such manifest necessity for the declaration of a mistrial existed here. The trial court appropriately instructed the jury to disregard the testimony about the tag number. As the State points out, jurors are presumed to follow the instructions of the trial court. See State v. Reid, 164 S.W.3d 286, 342 (Tenn. 2005); State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994). We conclude, therefore, that the trial court did not err in denying the defendant's motion for a mistrial.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE